

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

DENISE FORNEY,

Plaintiff,

v.

18-CV-616

**GRAND ISLAND CHIROPRACTIC, P.C., and
CHIROPRACTIC OFFICE SOLUTIONS, INC.**

Defendants.

DECISION AND ORDER

This case was referred to the undersigned by the Hon. Lawrence J. Vilardo, pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. No. 9. It was thereafter reassigned to the Hon. John L. Sinatra, Jr. Dkt. No. 30. Plaintiff Denise Forney (“Plaintiff”) alleges that Defendants violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, by sending unsolicited commercial text messages to her cell phone. Dkt. No. 1. Currently before the Court is Plaintiff’s Motion to Compel certain discovery and for attorney’s fees associated with bringing the motion. Dkt. No. 43.

This case was commenced over three years ago. Dkt. No. 1. During its pendency, Defendants moved unsuccessfully to dismiss the complaint and for summary judgment. Dkt. Nos. 15, 27, 31. This Court conducted numerous status conferences to keep the case moving along, directing the parties to exchange relevant discovery materials. Dkt. No. 15, 26, 33, 41. After a final extension, the deadline for discovery to be completed was set for February 19, 2021. Dkt. Nos. 36-1, 37. On February 12, 2021, the eve of the deadline, Plaintiff moved to compel responses to its First Set of Interrogatories,

Request for Production of Documents, and First Request for Admissions, which Plaintiff's counsel served Defendants on December 21, 2020, with a return date of January 25, 2021. Dkt. 43.

Despite emails and calls to Defendants' counsel, he did not respond to the request until April 8, 2021. Dkt. No. 47. Even then, Defendants' counsel served its Responses by mail, necessitating Plaintiff to file reply papers to the Motion to Compel. Dkt. No. 46, 47. Accordingly, Plaintiff's counsel now seeks attorney's fees "for Plaintiff having to waste it[s] time and burden the Court [with] the filing of this motion." Dkt. No. 46.

Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides, in relevant part:

If the motion [to compel disclosure or discovery] is granted – **or if the disclosure or requested discovery is provided after the motion was filed** – the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both of them to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But, the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

This Court finds that Plaintiff's counsel has made a sufficient showing that he attempted in good faith to get the disclosures before filing his motion. Defendants' counsel has failed to proffer any substantial justification for failing to respond in a timely manner to Plaintiff's

discovery demands. Moreover, there is nothing in the record to suggest that it would be unjust to compensate Plaintiff for the costs of having to file this Motion to Compel.

Accordingly, the Court directs Defendants to pay to Plaintiff the reasonable costs and attorney's fees of this Motion to Compel, which the Court estimates to be \$600, no later than **October 15, 2021**, unless Defendants object to this estimation, in which case Plaintiff's counsel shall submit an affidavit setting forth the actual cost of preparing the Motion to Compel and replying to it for the Court's calculation of actual expenses no later than **October 29, 2021**.

CONCLUSION

For all of the above reasons, Plaintiff's Motion to Compel (Dkt. No. 43) is GRANTED insofar as it asks for attorney's fees.

SO ORDERED.

DATED: Buffalo, New York
September 30, 2021

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge